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**NOTICE OF MOTION**

To the Court and all parties of record:

Please take notice that on May 9, 2022 at 1:30 p.m. or as soon thereafter as the matter may be heard, Plaintiffs Daniel Draney and Lorenzo Ibarra (“Plaintiffs”) move for an order: (1) preliminarily approving the proposed settlement of this class action on the terms set forth in the settlement agreement previously submitted; (2) approving the proposed notice of settlement as set forth in the proposed Amended Settlement Notice; (3) certifying a settlement class under Rule 23(b)(1)(b) or 23(b)(3); and (4) scheduling a final settlement hearing.

The motion is based on this notice of motion, the accompanying memorandum of points and authorities, declaration of Michael C. McKay, the expert reports of Dr. Steve Pomerantz, and Dr. D. Lee Heavner, the spreadsheet created by Dr. Pomernatz showing anticipated allocation of settlement funds, the Court’s file on this case, and such other evidence as may be presented at the hearing of this matter.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiffs filed an unopposed motion requesting the Court to certify this action as a class action and to preliminarily approve a class action settlement. (ECF No. 60.) The Court denied the motion without prejudice. (ECF. No. 62.) The Court’s Order denying the motion raises concerns about the merits of Plaintiffs’ claims, fairness of the proposed settlement, certification under Rule 23, evidence of damages, and notice to class members. (*Id.*, *e.g.*, at 2:8-17.)<sup>1</sup> Plaintiffs focus on the concerns raised in the Court’s Order denying the motion.

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<sup>1</sup> Plaintiffs and Plaintiffs’ Counsel offer chagrined apologies to the Court for not preemptively addressing the concerns raised in the Court’s Order denying the motion. Plaintiffs and Plaintiffs’ Counsel respectively appreciate the opportunity to do so in this Amended Motion.

1 Plaintiffs do not repeat the facts, law, arguments, exhibits, and evidence previously  
2 submitted with their original motion, but Plaintiffs' incorporate those herein.

## 3 **II. CLASS CERTIFICATION**

### 4 **A. Statute of Limitations Defense**

5 Before Defendants agreed to settle this case, Defendants moved for summary  
6 judgment. (ECF No. 49.) Defendants argued that Plaintiffs' claims are time barred by  
7 ERISA's three-year statute of limitations. (*Id.* at 3:23-27.)

8 Plaintiffs opposed Defendants' motion for summary judgment. (ECF No. 52)  
9 Plaintiffs argued that disputed issues of material facts exist concerning when Plaintiffs  
10 actually knew of Defendants' alleged fiduciary breaches. (ECF No. 52 at 4:1-7) (stating both  
11 Plaintiffs adamantly deny having actual knowledge of alleged the ERISA violations before  
12 the limitations period.)

13 After Defendants' motion for summary judgment was fully briefed the parties  
14 participated in a mediation with Gail A. Glick, Esq. who is a neutral with Judicate West. *See*  
15 Declaration of Michael McKay In Support Of Amended Motion For Class Certification And  
16 Preliminary Approval Of Class Action Settlement ("McKay Declaration") ¶ 4. The parties  
17 submitted mediation briefs and spent a full day mediating. *Id.* ¶¶ 5-6. The parties did not  
18 reach a settlement at the mediation. *Id.* at ¶ 6. However, Ms. Glick continued to work with  
19 the parties for over a month after the mediation concluded. *Id.* Ms. Glick eventually  
20 submitted to the parties a mediator's proposal. *Id.* ¶ 7. After three years of vigorous litigation  
21 and more than a month negotiating a potential settlement both parties agreed to settle the  
22 case consistent with the terms of the mediator's proposal.<sup>2</sup> *Id.*

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24 <sup>2</sup> The mediator, Gail A. Glick, Esq., agreed to provide a sworn declaration in support of this  
25 motion. Ms. Glick even emailed a draft declaration to counsel for the parties to review and  
26 approve. However, Ms. Glick, as a neutral, would not agree to sign her declaration for filing  
27 here unless Defendants consented to her doing so. Although Defendants had ample time to  
28 consent, Defendants did not consent until after the motion was drafted and late in the  
afternoon on the deadline for Plaintiffs to file this motion.



1           Thereafter, pursuant to Local Rule 16-15.7, the parties notified the Court of the  
 2 settlement. (ECF No. 57.) The Court then denied as moot Defendants' motion for summary  
 3 judgment and ordered Plaintiffs to file a motion for class certification and preliminary  
 4 approval of the proposed settlement. (ECF No. 59.)

5           Plaintiffs filed the motion as instructed by the Court. (ECF No. 60.) The motion was  
 6 unopposed. But the Court denied the motion, in part, because of concerns the Court has about  
 7 arguments Defendants made in their mooted motion for summary judgment. (ECF No. 62.)  
 8 The Court expressed concern that there may be "a rift in the class between employees with  
 9 non-time-barred, fully meritorious claims and employees with potentially time-barred, less  
 10 meritorious claims." (*Id.* at 8:11-15.) Plaintiffs understand and appreciate the Court's concern.  
 11 The concern, however, should not prevent class certification and preliminary approval of the  
 12 settlement for at least the following reasons.

13                     1.       Defendants' Motion for Summary Judgment is Moot

14           The Court denied Defendants' motion for summary judgment. (ECF No. 59.)  
 15 Defendants are no longer asserting any of the arguments in their motion for summary  
 16 judgment. The law is well established. Federal courts adjudicate actual, ongoing  
 17 controversies between litigants and "may not give opinions upon moot questions or abstract  
 18 propositions." *See Fishman v. Ponce*, Case No. CV17-201MWF(JC) at 8 (C.D. Cal. Sep. 15,  
 19 2017) *citing Deakins v. Monaghan*, 484 U.S. 193, 199 (1988) (citations omitted and  
 20 *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (*per curiam*)).

21           Plaintiffs respectfully submit the arguments Defendants made in their motion for  
 22 summary judgment are moot. They are abstract propositions. There is no controversy  
 23 between the parties about the limitations period. Unasserted and abstract arguments should  
 24 have zero impact on the parties' ability to settle this litigation.

25                     2.       There is No Rift Between Plaintiffs and Class Members

26           Typically, identification of class members is confirmed after a class is certified.  
 27 However, to assist in resolving the Court's concern about a potential rift between class  
 28

1 members, Plaintiffs' expert witness, Dr. Steve Pomerantz prepared a spreadsheet showing  
 2 the name of each class member, hire date, and allocation of the anticipated settlement funds  
 3 for each class member (before fees and expenses).<sup>3</sup> Dr. Pomerantz' spreadsheet will be filed  
 4 herewith under seal after approval from the Court. His spreadsheet identifies 39 class  
 5 members. All of the 39 class members identified by Dr. Pomerantz were hired by Defendants  
 6 at least three years before the filing of Plaintiffs' Complaint. As such, all of the identified  
 7 class members are subject to a similar statute of limitation argument as the one Defendants  
 8 made in their mooted and denied motion for summary judgment. Accordingly, there is no  
 9 rift between class members.

10 In the event that a few additional class members are later identified who were hired by  
 11 Defendants within three years from the filing Plaintiffs' Complaint, there will still be no rift.  
 12 First, the settlement was negotiated and executed without any consideration to the arguments  
 13 made in Defendants' motion for summary judgment. Second, all class members benefit  
 14 equally from the settlement because class members have been able to spread the expense of  
 15 litigating amongst the entire class on a *pro rata* basis. Third, the settlement treats all class  
 16 members the same in terms of how the Plan allocates settlement proceeds, as required by  
 17 ERISA. *See Alday v. Raytheon Co.*, 619 F.Supp.2d 726, 736 (D. Ariz. 2008) (certifying class  
 18 under Rule 23(b)(1)(A) in ERISA action, noting that "ERISA requires plan administrators  
 19 to treat all similarly situated participants in a consistent manner.")  
 20  
 21  
 22

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23  
 24 <sup>3</sup> Before filing this Amended Motion, Plaintiffs sent Defendants a copy of a spreadsheet Dr.  
 25 Pomerantz created that identifies the 39 class members and their anticipated allocation of  
 26 the settlement. Plaintiffs also sent Defendants the source document that Dr. Pomerantz  
 27 relied upon to create the spreadsheet. Plaintiffs requested Defendants to confirm the  
 28 information in the spreadsheet is accurate. Defendants did not substantively respond. But  
 the parties should easily be able to agree on the identity of class members and their  
 anticipated allocation once a class is certified.



1 if claims were filed sooner. Either way, the damages period is three years. There is no actual  
2 evidence of any piling up of damages.

3 6. Second Motion For Summary Judgment

4 The Court made comments about the perceived strength of Defendants' mooted and  
5 denied motion for summary judgment. (ECF No. 62 at 11:2-5.) Given those comments, the  
6 Court may question whether Defendants will file a second motion for summary judgment  
7 and seek to extinguish Plaintiffs' and all absent class members' claims rather than settle this  
8 case as it agreed in the signed settlement agreement and to provide hundreds of thousands of  
9 dollars of benefits to Plaintiffs and absent class members. This is a fair question.

10 Given the extensive litigation efforts and tactics employed by Defendants thus far in  
11 this case, Plaintiffs expect Defendants to file a second summary judgment motion. The  
12 settlement agreement Defendants executed requires them to use their best efforts to finalize  
13 the settlement. If Defendants' were to file a second motion for summary judgment because  
14 of comments made by the Court, Defendants would be in breach of the settlement agreement.

15 If Defendants were to breach the settlement agreement because of comments made by  
16 the Court and file a second motion for summary judgment, the motion would necessarily be  
17 limited to the merits of Plaintiffs' claims and not the claims of absent class members. The  
18 class in this case has not yet been certified yet, so absent class members' claims cannot be  
19 adjudicated in a motion for summary judgment. *See Schwarzschild v. Tse*, 69 F.3d 293, 295  
20 (9th Cir. 1995) ("District courts generally do not grant summary judgment on the merits of  
21 a class action until the class has been properly certified and notified.")

22 Therefore, if Defendants were to file a second motion for summary judgment,  
23 Plaintiffs would seek leave to add absent class members as named plaintiffs. Those absent  
24 class members will testify and submit declarations showing that they had no knowledge  
25 about Defendants' alleged ERISA violations until just before or after Plaintiffs' Complaint  
26 was filed.

1 In addition, Plaintiffs would file a more robust opposition concerning Plaintiffs' actual  
 2 knowledge. Plaintiffs' opposition would emphasize that they had no actual knowledge of the  
 3 alleged fiduciary breaches. *Ziegler v. Connecticut General Life Ins., Co.*, 916 F.2d 548, (9th  
 4 Cir. 1990) (holding the "inquiry into plaintiffs' actual knowledge is entirely factual,  
 5 requiring examination of the record.") The Court seemed to adopt Defendants' argument on  
 6 this question of disputed material fact because of cherry-picked portions of Plaintiff  
 7 Draney's deposition transcript. Plaintiffs' respectfully submit, however, that Defendants  
 8 mischaracterized Draney's deposition testimony. Indeed, on page 11, line 21 of Defendants'  
 9 motion for summary judgment, Defendants concede that during Draney's deposition Draney  
 10 denied having actual knowledge of Defendants' ERISA fiduciary breaches. (ECF No. 49.)  
 11 But Defendants did not provide the Court with this portion of Draney's deposition transcript.  
 12 If a second motion for summary judgment is filed as to the actual knowledge of Plaintiffs,  
 13 Plaintiffs will simply provide truthful evidence to the Court the demonstrates they had no  
 14 actual knowledge of Defendants' ERSIA breaches until shortly before the filing of their  
 15 Complaint. The Court should not resolve this disputed question of material fact in favor of  
 16 Defendants at the motion for summary judgment stage.

17 Further, Plaintiffs' opposition would also emphasize that the scope and breadth of  
 18 Defendants' alleged ERISA violations extend far beyond Defendants' investment strategy  
 19 for the Plan (which the Court seemed to suggest is accurate). For example, Plaintiffs allege  
 20 in their Complaint and argue in their opposition to Defendants' motion for summary  
 21 judgment, that Defendants breached ERISA's duty of prudence by failing to "*monitor* the  
 22 Plan's investments and to *replace* poorly performing investments." (*Id.* at 3:25-28.)  
 23 Defendants have a continuing duty to *monitor* investments and to *replace* imprudent ones.  
 24 *Terraza v. Safeway, Inc.*, 241 F. Supp. 3d 1057, 1068 (N.D. Cal. 2017). That duty "exists  
 25 separate and apart from the duty to exercise prudence in selecting investments at the outset."  
 26 *Id.* As a result, where plaintiffs "allege that a fiduciary breached the duty of prudence by  
 27 failing to properly *monitor* investments and *replace* imprudent ones, the claim is "timely" so

1 long as the alleged breach of the continuing duty occurred within the limitations period. *Id.*  
 2 Defendants breached their continuing duty to *monitor* investments and to *replace* imprudent  
 3 investments during the three years prior to the filing of Plaintiffs' Complaint. It seems even  
 4 Defendants' expert witness concedes that much. Thus, allegations concerning Defendants'  
 5 failure to *monitor* and *replace* are not even subject to the statute of limitations argument in  
 6 Defendants' motion for summary judgment.

7 In summary, it should be axiomatic that a party who signs a settlement agreement that  
 8 includes mutual releases of all claims and defenses is precluded from breaching the  
 9 agreement after learning a judge believes a potential meritorious defense may exist with  
 10 respect to settled claims. This ought to be especially true when the Court's comments  
 11 jeopardize absent class members' ability to participate in a settlement as is the case here. The  
 12 motion should be denied in any event. And the motion would create further delay and  
 13 unnecessary expense.

14 **B. Effect Of Statute Of Limitations Defense On Class Certification:**  
 15 **Typicality and Adequacy**

16 The Court expressed concern that the "strong" statute of limitations defense creates  
 17 two subclasses of plaintiffs: (1) a class of employees who were not aware of the Plan's  
 18 holdings prior to the limitations period and whose claims are not time barred, and (2) a class  
 19 of employees who were aware, and whose claims are therefore likely-time barred." (ECF  
 20 No. 62, 10:4-8.) Again, there is no motion pending about any statute of limitations defense.  
 21 Accordingly, there is no basis for the Court to be concerned about Plaintiffs and absent class  
 22 members having claims that are "likely-time barred." Further, there is no need for two  
 23 subclasses as all, or virtually all, of the class members are similarly situated with respect to  
 24 the statute of limitations. Accordingly, Plaintiffs satisfy the typicality and adequacy elements  
 25 of Rule 23.

26 Even assuming *arguendo* Defendants later contend that Plaintiffs' claims are barred  
 27 by the statute of limitations, the case should still be certified. *See Beck-Ellman v. Kaz USA,*



1 *Inc.*, 283 F.R.D. 558, 566 (S.D. Cal. 2012) (concluding that the named plaintiff's claims  
 2 were typical despite the possibility that some of her claims were subject to a time-barred  
 3 defense). The possibility of individual questions regarding statute of limitations is not fatal  
 4 to class certification when there is a sufficient nucleus of common questions. *Williams v.*  
 5 *Sinclair*, 529 F.2d 1383, 1388 (9th Cir. 1975) ("The existence of a statute of limitations issue  
 6 does not compel a finding that individual issues predominate over common ones"); *see also*  
 7 *Cameron v. E.M. Adams & Co.*, 547 F.2d 473, 478 (9th Cir. 1976) (same); *Joint Equity*  
 8 *Comm. of Investors of Real Estate Partners, Inc. v. Coldwell Banker Real Estate Corp.*, 281  
 9 F.R.D. 422, 436 (C.D. Cal. 2012) (same); *Tait v. BSH Home Appliances Corp.*, 289 F.R.D.  
 10 466, 486 (C.D. Cal. 2012) (holding that defendant's statute of limitations defense did not  
 11 raise sufficient individual inquiries to defeat class certification where plaintiffs' arguments  
 12 to rebut the defense raised common questions of law and fact;); *Pace v. Quintanilla*, Case  
 13 No.: CV 14-2067 DOC (RNBx), at \*5-6 (C.D. Cal. July 31, 2015) (same).

14 Here, Defendants made no disclosures to Plan participants about the Plan from 2013  
 15 to 2018. (ECF 52 at 4:1-13.) Defendants essentially kept the Plan a secret from all Plan  
 16 participants. At risk of stating a blinding glimpse of the obvious, it would have been  
 17 impossible for class members to have actual knowledge of whether Defendants breached  
 18 their ERISA fiduciary duties during the limitations period because Defendants made no  
 19 disclosures about the Plan during the limitations period. Thus, not only is the statute of  
 20 limitations no impediment to certification because there is no actual controversy pending  
 21 involving the statute of limitations, but also this is an affirmative defense that affects the  
 22 entire class, and if the argument were ever raised, it ought to be addressed on a class wide  
 23 basis. All of the other material facts and law about the claims of Plaintiffs and absent class  
 24 members are virtually identical. Accordingly, Plaintiffs easily satisfy the typicality and  
 25 adequacy requirements.

**C. Certification Under Rule 23(b)(1)**

The Court found certification under Rule 23(b)(1) is inappropriate because Plaintiffs are “seeking individualized compensatory relief.” (ECF 62 at 11:22-24.) However, this is not accurate. Plaintiffs Complaint was brought in a representative capacity on behalf of the entire Plan. (ECF No. 23, at ¶ 1.) Plaintiffs’ claims are being pursued on behalf of the entire Plan. (*Id.*). The damages Plaintiffs are seeking are on behalf of the Plan. Plaintiffs are not seeking any individual damages. Indeed, the settlement even excludes any “individual claims for relief seeking benefits under state law.” (Settlement Agreement ¶ 3.1.1.)

Although the Plan will allocate money from the settlement to class members’ individual Plan accounts, the Plan’s allocation does not convert the case to one for individual money damages. There are no “individualized inquiries” as to money damages. *See Wit v. United Behavioral Health*, 317 F.R.D. 106, 132-33 (N.D. Cal. 2016) (explaining that ERISA breach of fiduciary duty cases that do not involve “individualized inquiries” as to money damages ought to be certified under Rule 23(b)(1) or (b)(2)).

A very similar fact pattern was presented to the Judge Ishii in *Colesberry v. Ruiz Food Products, Inc.*, CV F 04-5516 AWI SMS at \*9 (E.D. Cal. June 30, 2006). In *Colesberry*, the proposed settlement required defendants to pay money to a retirement plan, then the plan was to allocate the money to plan participant individual accounts. The parties stipulated the class ought to be certified under Rule 23(b)(1)(b). The Court requested extra briefing on the question about whether certification under Rule 23(b)(1)(b) was appropriate, or if the class was seeking individualized compensatory relief. After supplemental briefing the Court held,

“the parties have satisfied the requirements for a Rule 23(b)(1)(B) class because this action primarily seeks monetary relief for the Plan, not the individual Plaintiffs or class members. The propriety of Rule 23(b)(1) certification in this action is confirmed by the vast number of cases in which courts have certified ERISA class



1 actions pursuant either to Rule 23(b)(1)(A) or Rule 23(b)(1)(B),  
 2 or both.” *Id.*

3 The same is true here. Plaintiffs claims are on behalf of the Plan. The damages and  
 4 settlement is on behalf of the Plan. Although the Plan will allocate money to individual  
 5 accounts, this is how virtually all ERISA class settlement function. This methodology does  
 6 not convert the claims into ones for “individualized money damages.”

7 The Court also expressed doubts about whether Plan participants pursuing separate  
 8 actions would create a risk of inconsistent or varying adjudications that would establish  
 9 incompatible standards of conduct for Defendants. (ECF No. 62 at 12:26-28.) The further  
 10 Court indicated that it was not clear to the Court how if one Plan participant got a judgment  
 11 that Defendants violated ERISA, and a second Plan participant brought a similar claim in a  
 12 separate action, and the second Plan participant’s claim was dismissed how that process  
 13 would impose incompatible standards of conduct on Defendants. (*Id.*)

14 ERISA requires fiduciaries to treat all Plan participants similarly. *Traylor v. Avnet,*  
 15 *Inc.*, 257 F.R.D. 521, 528 (D. Ariz. 2009). If Plan participants get differing judgments  
 16 concerning Defendants’ administration of the Plan, those judgments would result in *per se*  
 17 incompatible standards of conduct for Defendants. Courts have consistently held that “a  
 18 violation of ERISA with respect to one participant generally establishes a violation with  
 19 respect to all similarly situated participants.” *Id.* at 528.

20 This is precisely why courts have uniformly held “[c]ertification under Rule 23(b)(1)  
 21 is particularly appropriate in cases involving ERISA fiduciaries who must apply uniform  
 22 standards to a large number of beneficiaries.” *Wit*, at 317 F.R.D. at 132-33. Indeed, as Judge  
 23 Breyer noted in *Kanawi v. Bechtel Corp.*, “[m]ost ERISA class action cases are certified  
 24 under Rule 23(b)(1).” 254 F.R.D. at 111; *see also Z.D. ex rel. J.D. v. Grp. Health Co-op.*,  
 25 No. C11-1119RSL, 2012 WL 1977962, at \*7 (W.D. Wash. June 1, 2012) (stating that “[t]he  
 26 Court can envision few better scenarios for certification under (b)(1)(A) or (b)(1)(B)” than  
 27 claims that an ERISA fiduciary’s internal policy or practice was illegal); *see also Douglin v.*

1 *GreatBanc Trust Co.*, 115 F. Supp. 3d 404, 412 (S.D.N.Y. 2015) (“The Supreme Court has  
 2 observed that actions for breach of fiduciary duties are ‘classic examples’ of Rule 23(b)(1)  
 3 cases, . . . and courts in this Circuit have indeed determined that claims for breach of fiduciary  
 4 duty brought under ERISA , 29 U.S.C. § § 1132(a)(2) . . . are well suited to Rule 23(b)(1).”)

5 The Court relied on *Wu v. Pearson*, 277 F.R.D. 255, 261 (S.D.N.Y. 2011) for the  
 6 proposition that the risk of varying adjudications requires a case-by-case inquiry. (ECF No.  
 7 62 at 12:10-25.) But *Wu*’s claims were brought under the Copyright Act. There is no  
 8 discussion of ERISA in the *Wu* opinion. The analysis in *Wu* involved review of artwork and  
 9 an array of individual issues not present in this case or ERISA class actions in general. *Wu*  
 10 is not helpful. The Court also referenced *Feinstein v. Firestone Tire and Rubber Co.*, 535 F.  
 11 Supp. 595, 600 n. 5 (S.D.N.Y. 1982). However, *Feinstein* is inapposite. *Feinstein* involved  
 12 product defect claims. There were no ERISA claims or any ERISA analysis in the *Feinstein*  
 13 opinion. Moreover, portion of the opinion cited by the Court provides, “[t]he only effect of  
 14 inconsistent decisions would be the payment of damages to some claimants but not to  
 15 others.” This analysis does not apply here. Again, if multiple Plan participants brought  
 16 claims in multiple separate proceedings alleging that Defendants breached their ERISA  
 17 fiduciary duties owed to the Plan then the potential for varying adjudications about the same  
 18 facts and administration of the Plan could cripple the Plan, its participants, and Defendants.  
 19 Were this Court to find that “the Plan requires Defendants to act in a certain fashion, ERISA  
 20 would require Defendants to act in a similar fashion toward all Plan participants—the  
 21 quintessential (b)(1)(B) scenario.” *K.M v. Regence Blueshield*, Case No. C13-1214 RAJ (at  
 22 \*25 (W.D. Wash. Jan. 24, 2014). “If another court were to interpret the Plan differently, it  
 23 would trap Defendants in the inescapable legal quagmire of not being able to comply with  
 24 one such judgment without violating the terms of another,” which is what Rule 23(b)(1) was  
 25 enacted to remedy. *Id.* For example, if one court found it was prudent for Defendants to only  
 26 offer Plan members the ability to invest in certificates of deposit and another court found it  
 27 was imprudent for Defendants to only offer certificates of deposit, Defendants those

1 conflicting orders would create incompatible standards for Defendants in their role as  
2 fiduciaries to the Plan.

3 Further, unlike in *Firestone*, there is no concern here about some class members  
4 receiving compensation but not others. Here, the Plan will allocate settlement proceeds to all  
5 class members consistent with the Plan's governing documents and as required by ERISA.

6 In sum, Plaintiffs satisfy both prongs of Rule 23(b)(1). But it ought to be beyond  
7 dispute that Plaintiffs satisfy Rule 23(b)(1)(B). This case, like most ERISA class actions,  
8 should be certified under Rule 23(b)(1). *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 111 (N.D.  
9 Cal. 2008) (Breyer, J.).

#### 10 **D. Non-Opt Out Class**

11 The Court expressed concerns about protecting absent class members and the  
12 implications of a non-opt out class. The non-opt out aspect of Rule 23(b)(1) facilitates  
13 ERISA's requirement that all Plan participants are treated similarly. In addition, the non-opt  
14 out class protects absent class members from being pressured by defendants, who are  
15 typically class members' employers, from being coerced or otherwise unduly influenced to  
16 opt out of the settlement. Of course, all class members are free to object to the settlement.  
17 They are free to articulate concerns to the Court about the settlement. This Court will  
18 undoubtedly take any objections seriously. But the non-opt out provision serves most of all  
19 to protect absent class members and Defendants who have a legal duty to treat them all  
20 similarly.

#### 21 **E. Certification Under Rule 23(b)(3)**

22 If the Court declines to certify the class under Rule 23(b)(1) it should certify the Class  
23 under Rule 23(b)(3). *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 (9th Cir.  
24 1976) (holding in cases where (b)(1) and (b)(3) apply, (b)(1) is held to govern). To certify  
25 a class under Rule 23(b)(3), Plaintiffs must also satisfy two requirements. First, questions  
26 of law or fact common to class members must predominate over any questions affecting  
27 only individual members. Second, a class action must be superior to other available

1 methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(b)(3).  
 2 Both requirements are met.

3 1. Predominance

4 “The predominance inquiry tests whether proposed classes are sufficiently cohesive  
 5 to warrant adjudication by representation.” *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct.  
 6 1036, 1045 (2016). The Supreme Court has defined an individual question as “one where  
 7 members of a proposed class will need to present evidence that varies from member to  
 8 member . . . .” *Id.* (internal quotation marks omitted). A common question, on the other hand,  
 9 “is one where the same evidence will suffice for each member to make a prima facie showing  
 10 [or] the issue is susceptible to generalized, class-wide proof.” *Id.* (internal quotation marks  
 11 omitted).

12 Here, the common questions raised by Plaintiffs’ claims predominate over questions  
 13 affecting only individual members of the proposed class. Plaintiffs allege that Defendants  
 14 breached their ERISA duties of prudence to the Plan as a whole. Common questions of fact  
 15 and law predominate over any conceivable individual issues.

16 2. Superiority

17 The superiority requirement tests whether “a class action is superior to other available  
 18 methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).  
 19 The Court should consider four non-exclusive factors: (1) the interest of each class member  
 20 in individually controlling the prosecution or defense of separate actions; (2) the extent and  
 21 nature of any litigation about the controversy already commenced by or against the class; (3)  
 22 the desirability of concentrating the litigation of the claims in the particular forum; and (4)  
 23 the difficulties likely to be encountered in the management of a class action. *Id.*

24 Here, the interests of all class members are aligned as Plaintiffs are seeking relief on  
 25 behalf of the Plan as a whole and all class members are treated equally. The parties have  
 26 been actively litigating this case for over three years. Many of the absent class members are  
 27 aware of the litigation. None of the absent class members have commenced separate

litigation. Absent class members have either overtly or tacitly supported Plaintiffs and the claims in this lawsuit. The parties have reached a proposed settlement. Class members will all benefit from having the claims resolved in this matter, as opposed to potentially having to file separate claims, litigate those claims for years, and incur the fees and expenses associated with litigating those claims. As a practical matter, it would be economically irrational for absent class members to even attempt to do so given the complexity and expense of pursuing similar claims. There will be no difficulties in managing this case has a class action. The parties are able to contact and communicate with all class members. Plaintiffs have secured Defendants' signature on a proposed settlement agreement. This case could provide substantial cash compensation to class members in the very near future. That is important because many once class members receive cash payments in their respective individual accounts, they will be able to invest, grow, and increase the earnings in their respective accounts.

Accordingly, if the Court does not certify the case under Rule 23(b)(1) it should do so under Rule 23(b)(3).

### **III. PRELIMINARY APPROVAL**

#### **A. Adequacy Of Negotiations**

The Court expressed concern because Defendants agreed to take no position on Class Counsel's anticipated application for attorneys' fees so long as class counsel do not request an award of attorneys' fees higher than 30% of the settlement amount and will instead leave Class Counsel's fees "to the sound discretion of the Court." (ECF 62 at 15:6-13.) This concern should not prevent the Court from preliminarily approving the settlement for at least the following reasons.

##### **1. Fees are Not at Issue**

The primary purpose of preliminary approval of a class action settlement is to provide class members with notice of the settlement and to provide class members with an opportunity to express their views with respect to the settlement. By informing class





ERISA contains a generous fee shifting provision. As the U.S. Supreme Court declared in *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242 (2010), under ERISA, the Court may award attorneys' fees based solely on a showing of some degree of success. Here, even Defendants' expert witness opines six-figures of damages are proper. And Defendants' appear to have convinced the Court that at least some of the class have "fully meritorious claims." If Class Counsel were motivated only by attorney fees, Class Counsel might be motivated to allow Defendants to continue aggressively litigating this case at every turn, take the case to trial, obtain a judgment on the merits, and apply for an award of fees under ERISA and request their full lodestar and a multiplier. Class Counsel, however, are clearly not taking this approach. Class Counsel are instead attempting to secure approval of the settlement. While Class Counsel's anticipated fee request has yet to be filed, if and when it is filed, the anticipated fee request will be beyond reasonable in every aspect and consistent with Ninth Circuit precedent.

#### 4. Defendants Did Not Capitulate

The Court suggested the settlement may be unfair because "this appears to be a case of a defendant simply capitulating to a settlement which it finds fair from its perspective, but which may harm potential class members not represented by the named plaintiffs or their counsel." (ECF 62:22-24.) Plaintiffs have no explanation for this statement. At every stage of this proceeding Plaintiffs and Class Counsel have sought to protect and advocate for all absent class members.

Defendants are uniquely positioned, having litigated the case for over three years, to understand the amount of time and work put into this case by both sides. Defendants have likely spent far more than \$150,000 in attorney fees litigating this case. And Defendants are likely aware that if Class Counsel request \$150,000 in fees that such a request would be reasonable given the amount for the work Class Counsel have done in the case – and the work Class Counsel still need to do in the case. Plaintiffs are unaware of any law requiring a defendant to contest a reasonable request for fees. If Class Counsel agreed to seek no more

1 than \$10 in attorney fees would Defendants be seen as capitulating if they agreed not to  
2 contest a \$10 fee award? Plaintiffs respectfully submit the answer is no.

3 5. *Briseño* Is Not Applicable

4 The Court relied on *Briseño v. Henderson*, 998 F.3d 104, 1018 (9th Cir. 2021) to deny  
5 preliminary approval. (ECF 14:15-20.) However, the *Briseño* Court granted preliminary  
6 approval of the class action settlement. Notice of the settlement was sent to class members.  
7 One of the class members, a law professor from the University of Michigan, objected to the  
8 settlement at the final fairness hearing. The district court granted final approval of the  
9 settlement. The objector appealed to the Ninth Circuit. Here, the Court has not preliminarily  
10 approved the settlement. No class members have been afforded the opportunity to express  
11 views about the settlement. No class member has objected to the settlement. These are  
12 critical steps in the class action settlement process. *Briseño* is simply not applicable at this  
13 stage of the proceeding.

14 The Court also referenced *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935,  
15 947 (9th Cir. 2011). *In re Bluetooth* is also not applicable. Like *Briseño*, the *In re Bluetooth*  
16 opinion addresses standards for final approval of a class action settlement, not preliminary  
17 approval.

18 Moreover, the facts of both *Briseño* and *In re Bluetooth* are not even remotely similar  
19 to the facts here. There were objectors to the proposed final settlement in *Briseño* and *In re*  
20 *Bluetooth*. There are no objectors to the settlement here. In *In re Bluetooth*, the attorneys'  
21 fees totaled 83.2% of the total amount defendants paid to settle the case. In *Briseño* the  
22 objector argued attorneys' fees swallowed up 88% of the class actual recovery. Here, the  
23 Court has not approved any attorney fees. And here, Plaintiffs agreed to request no more  
24 than 30% of the settlement amount. But perhaps most importantly, the settlements in  
25 *Briseño* and *In re Bluetooth*, contained a reverter or a kicker. Clearing sailing agreements  
26 without fee caps (like the 30% one here) when combined with reverters or kickers should  
27 raise red flags. Some argue that unethical counsel may agree to a reverter or a kicker that  
28



1 returns unawarded settlement benefits to a defendant rather than to the class in exchange  
 2 for a defendant agreeing to pay counsel generous fees via a clear sailing agreement. But the  
 3 settlement here contains no reverter or kicker. Here, all of the settlement funds will be  
 4 provided to class members. Therefore, the “clear sailing agreement” in the settlement does  
 5 not even potentially prejudice any class member. And of course, if Class Counsel seek more  
 6 than 30% of the settlement, Defendants can oppose the request. So, the provision is not  
 7 truly a clear sailing agreement. The settlement here also does not include any injunctive  
 8 components or other non-monetary benefits that sometimes inflate the value of a settlement  
 9 when counsel seek fees based on the total value of a settlement. There is no dispute or  
 10 subjectivity concerning the value of the settlement. The settlement provides cash to class  
 11 members. Class Counsel’s anticipated fee request will be based on actual cash provided to  
 12 class members, not hypothetical injunctive relief or other potentially opaque benefits. While  
 13 the *Briseño* Court found that the settlement in that case “reeked of collusion at the expense  
 14 of the class members” *Id.* 998 F.3d at 1018, the settlement here contains none of the actual  
 15 problems identified in the *Briseño* opinion.

#### 16 6. Plaintiffs Stipulate Defendants May Object To A Fee Application

17 If the Court remains concerned at the preliminary approval stage about Defendants’  
 18 agreement to leave Class Counsel’s anticipated fee request to the sound discretion of the  
 19 Court, so long as Plaintiffs’ request no more than 30% of the settlement, Plaintiffs stipulate  
 20 that Defendants may oppose any fee request Class Counsel makes.

#### 21 **D. Fairness Of Settlement Terms**

##### 22 1. Expert Reports

23 The Court expressed concern that the evidence submitted by Plaintiffs to show the  
 24 settlement is within the range of reasonableness is inadequate. (ECF No. 16:27-18.) The  
 25 Court requested additional information about the parties’ respective experts, their  
 26 methodology, analysis, and conclusions. (*Id.* at 17:1-16.)

1 Plaintiffs retained Dr. Steve Pomerantz to calculate damages and serve as their expert  
 2 witness. Dr. Pomerantz's prepared an expert report. His expert report will be filed herewith  
 3 under seal after approval from the Court. As described in Exhibit 1 to his report, Dr.  
 4 Pomerantz has appeared as expert witness in over 90 cases; most of these cases involved  
 5 ERISA breach of fiduciary duty claims, similar to the ones here.

6 Dr. Pomerantz describes in his report that to calculate damages he used Morningstar  
 7 to extract quarterly performance data for alternative investments that would have been  
 8 available for the Plan. Plan balances were identified from statements provided from February  
 9 29, 2016 through February 28, 2019 (the limitations period). In order to calculate damages,  
 10 Dr. Pomerantz compared the interest earned by the Plan's portfolio of investments with the  
 11 investment return of a prudent comparator each quarter based on the prevailing asset level  
 12 for each quarter. This provides a damage amount for each quarter. For example, if in a given  
 13 quarter the interest earned on a certificate of deposit owned by the Plan was 0.50% and the  
 14 alternative prudently managed return was 2.00%, then the damage incurred on a \$5 million  
 15 balance for that quarter was \$75,000. After damages were calculated, Dr. Pomerantz present  
 16 valued the damages to December 2020 using the returns of the comparator investments. The  
 17 comparator used represents a prudently managed portfolio.

18 It is common for expert witnesses in ERISA cases like this one to argue about proper  
 19 investment portfolio comparators when calculating damages. To avoid this argument, Dr.  
 20 Pomerantz created three alternate investment portfolio comparators. Dr. Pomerantz relied on  
 21 a survey of 401(k) plans to establish that the average equity allocation for 401(k) plans is  
 22 67.4% and fixed income allocation of 32.6%. The first portfolio comparator was created by  
 23 using the Vanguard Total World Index and Vanguard Total World Bond Index (using a  
 24 60%/40% allocation). The second portfolio comparator was created using the Vanguard  
 25 LifeStrategy Moderate Growth Fund (which is invested in roughly 60% equities and 40%  
 26 fixed income). The third comparator portfolio was created using Vanguard's Target  
 27

1 Retirement Funds (which also contain a mix of equity and fixed income investments). The  
 2 average of the three alternate investment portfolio comparators yields damages of \$734,545.

3 Dr. Pomerantz charges \$650 per hour for his services. Class Counsel have advanced  
 4 Dr. Pomerantz' fees for services rendered in this case. Plaintiffs are cognizant that if these  
 5 case does not settle, Dr. Pomerantz' fees – although well earned – will likely increase  
 6 substantially.

7 Defendants retained Dr. D. Lee Heavner as their expert witness. Dr. Heavner is a  
 8 well-known expert witness in ERISA class actions. His expert report will also be filed  
 9 herewith under seal after approval from the Court. Dr. Heavner generally followed the  
 10 methodology that Dr. Pomerantz used. But he took minor issue with some of Dr. Pomerantz'  
 11 methodology. Even still, Dr. Heavner concludes class damages of \$652,575. Dr. Heavner  
 12 charges \$900 per hour for his services.

13 Defendants agreed to settle this case for \$500,000 in cash. The settlement here is a  
 14 relatively strong one – it is easily within the range of reasonableness. First, participation in  
 15 mediation tends to support the conclusion that the settlement process was not collusive. The  
 16 Court ought to be reassured by the fact the parties settled only after participating in a full-  
 17 day mediation with an experienced third-party neutral, and then continued to negotiate the  
 18 settlement for nearly a month before an agreement was reached.

19 Second, the Court should consider the settlement to be an especially strong one given  
 20 that the Court expressed concern over the merits of the claims at bar for the overwhelming  
 21 number of absent class members.

22 Third, "class actions are inherently risky." *Aichele v. City of Los Angeles*, Case No.  
 23 CV12-10863-DMG (FFMx) at \*6 (CD. Cal. Sep. 9, 2015). The settlement removes all risk  
 24 of class members taking nothing and provides immediate substantial cash payments to class  
 25 members.

26 Fourth, the settlement provides class members with roughly 68% of their potential  
 27 recovery (before fees and costs). This is an excellent recovery. District courts routinely

1 approve settlements that provide far less of a recovery to class members. *See Dearaujo v.*  
 2 *Regis Corp.*, No. 2:14-cv-01408-KJM-AC at \*1026 (E.D. Cal. June 29, 2016) (preliminary  
 3 approval of settlement representing 37% of potential recovery); *see also In re Rite Aid Corp*  
 4 *Sec. Litig.*, 396 F.3d 294, 298 (3d Cir. 2005) (noting statistical data that a range of approved  
 5 settlement median rates from 27% to 30% of potential recoveries over the course of a two  
 6 year period in selected federal district courts); *Foster v. Adams & Assoc.*, 18-cv-02723-JSC  
 7 at 8 (N.D. Cal. Oct. 21, 2021) (approving settlement valued at 28.5% of maximum recovery).

8 Fifth, the settlement eliminates delay. This case has already been pending for over  
 9 three years. Often, justice delayed is justice denied. Plaintiffs are concerned that if the  
 10 settlement is not at least preliminarily approved, this case will continue to be litigated for  
 11 years to come.

## 12 2. Independent Fiduciary Review

13 The Court's concern about the fairness of the settlement will also be addressed by an  
 14 independent fiduciary who will review the settlement for fairness and opine to the Court on  
 15 whether the settlement is fair.

16 The Department of Labor has concluded that a prohibited transaction occurs when a  
 17 plan fiduciary causes a plan to release a claim against a person who is a party in interest at  
 18 the time of the settlement. DOL Adv. Opinion 95-26A (Oct. 17, 1995). To overcome this  
 19 hurdle and facilitate ERISA settlements in such circumstances, the Department of Labor  
 20 issued Prohibited Transaction Exemption, or PTE, 2003-39, which covers the release of a  
 21 plan's claims in exchange for consideration from a party in interest in partial or complete  
 22 settlement of actual or threatened litigation. *See* PTE 2003-39, 68 Fed. Reg. 75,632 (2003).  
 23 The exemption requires a settlement to be approved and authorized by an independent  
 24  
 25  
 26  
 27

1 fiduciary, which acts in the plan's interest and reviews the terms of the settlement to ensure  
2 it meets certain criteria.<sup>4</sup>

3 Here, the settlement releases claims by the Plan against Alan and Steven Zwilling.   
4 Indeed, the settlement agreement defines the Zwillingers as parties-in interest. (Settlement  
5 Agreement ¶ 1.17.) Thus, the settlement will need to be scrutinized and approved by an  
6 independent fiduciary if the Court grants preliminary approval. The independent fiduciary's  
7 report will be very helpful. By way of illustration, Class Counsel also represents a certified  
8 class of plan participants with account balances in the University of Miami 401(k) plan. *See*  
9 McKay Decl. ¶ 8. The district court in that case granted preliminary approval of a class wide  
10 settlement. *Id.* After the court granted preliminary approval, an independent fiduciary was  
11 retained in that case to review and opine on the settlement. *Id.* The independent fiduciary's  
12 report was issued just last week. It is attached as Exhibit 1 to the McKay Declaration.  
13 Plaintiffs anticipate providing the Court with a similar report from an independent fiduciary  
14 if the Court grants preliminary approval of the settlement. That anticipated report should also  
15 allay any concern the Court has about the fairness of the settlement.

#### 16 **E. Notice To Class Members**

17 The Court requested more information be provided to class members in the notice they  
18 will receive about the settlement if the court grants preliminary approval. Plaintiffs adopted  
19  
20

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21 <sup>4</sup> The settlement must be reasonable in light of the plan's likelihood of full recovery, the  
22 risks and costs of litigation, and the value of claims foregone, and the terms and conditions  
23 of the transaction must be no less favorable to the plan than comparable arm's length terms  
24 and conditions that would have been agreed upon by unrelated parties under similar  
25 circumstances. *See* PTE 2003-39 §§ II(c), (d), 68 Fed. Reg. 75,639. In assessing  
26 reasonableness, the independent fiduciary must consider the entire settlement, including (1)  
27 the scope of the release of claims, (2) the value of any noncash assets to be received by the  
28 plan, and (3) the amount of any attorney's fee award or other sums to be paid from the  
recovery. *See* Adoption of Amendment to the Class Exemption for the Release of Claims  
and Extensions of Credit in Connection With Litigation (PTE 2003-39), 75 Fed. Reg.  
33,830 (2010).

1 both of the Court's suggestions concerning augmenting the notice to class members. An  
 2 amended form of Class Notice is attached as Exhibit 2 to the McKay Declaration.

3 The Amended Notice instructs class members to telephone Class Counsel to receive  
 4 estimated payment information. *See* Exhibit 2 to the McKay Declaration, Paragraph 9 of the  
 5 Amended Notice. This is private and confidential information that should not be shared in a  
 6 notice sent to all class members. But Plaintiffs will share the information with individual  
 7 class members. Plaintiffs will confer with Defendants to ensure the parties agree on the data.  
 8 Plaintiffs will then share the information with any class members who telephone. In addition,  
 9 the Amended Notice includes a table showing estimated payouts depending on the weighted  
 10 average balance in class members' Plan accounts. The information in the table will also  
 11 provide class members with an estimate of their anticipated recovery under the settlement.

#### 12 **IV. MEET AND CONFER**

13 As required by Local Rule 7-3, Class Counsel participated in two lengthy discussions  
 14 with Defendants' counsel concerning the issues raised in this motion. Class Counsel  
 15 informed Defendants' counsel that Plaintiffs would be filing an amended motion for class  
 16 certification and preliminary approval. Class Counsel articulated the main arguments in this  
 17 motion to Defendants' counsel. Further, Class counsel obtained Defendants' counsel's  
 18 written permission to apply to file the parties' expert witness reports under seal in connection  
 19 with the amended motion. Class Counsel also emailed Defendants' counsel the spreadsheet  
 20 Dr. Pomerantz created that identifies class members and contains an estimated allocation of  
 21 settlement benefits for each class member. Class Counsel requested Defendants' counsel to  
 22 confirm the accuracy of the data in Dr. Pomerantz' spreadsheet, or to provide additional  
 23 information. Defendants' counsel did not substantively respond to the request. Class Counsel  
 24 also emailed the mediator Gail A. Glick and requested her to submit a declaration in support  
 25 of the amended motion. Ms. Glick agreed to submit a declaration. She emailed a draft  
 26 declaration to counsel for Plaintiffs and Defendants. Ms. Glick stated that she would not sign  
 27 the declaration unless counsel for both parties consented to her doing so. Defendants'

counsel did not substantively respond to the mediator until after the amended motion was drafted and just before it was filed. Plaintiffs satisfied its meet and confer obligations. During the meet and confer efforts, Defendants counsel indicated that Defendants would withhold taking a position on the amended motion until after it was filed. *See* McKay Declaration ¶ 10.

## V. CONCLUSION

Plaintiffs express gratitude to the Court for the opportunity to submit this amended motion. Plaintiffs respectfully request the Court to certify this case as a class action, grant preliminary approval of the proposed settlement, approve the amended notice, and schedule a final fairness hearing.

DATED: March 8, 2022

Respectfully submitted,

/s/ Michael C. McKay

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 08, 2022, I electronically transmitted the attached document to the Clerk of the Court using ECF System for filing and served on the following person(s) in the manner indicated below:

TRUCKER ♦ HUSS  
Joseph C. Faucher, Esq.  
Brian D. Murphy, Esq.  
15821 Ventura Blvd. Ste. 510  
Los Angeles, CA 91436

☒ by CM/ECF Electronic Mail  
☐ by Facsimile Transmission  
☐ by First Class Mail  
☐ by Hand Delivery  
☐ by Overnight Delivery

/s/ Michael C. McKay

Michael C. McKay, Esq.